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LEGAL PROCESS #1

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

BILL LOCKYER, Attorney General of the
State of California,

Petitioner,

v.

BRUCE McPHERSON, as the Secretary of
State for the State of California; and GEOFF
BRANDT, as the Acting State Printer with the
Office of the State Publishing,

Respondents.

EDWARD J. ("TED") COSTA, SIDNEY S.
NOVARESI, ARTHUR LAFFER, JIMMIE
JOHNSON,

Real Parties In Interest.

Case No. **05CS00998**

PETITION FOR WRIT OF MANDATE
[Code Civ. Proc., §1085]

STATEWIDE ELECTION MATTER
IMMEDIATE ACTION REQUESTED

INTRODUCTION

Petitioner, Bill Lockyer, in his official capacity as Attorney General of the State of California, brings this petition for writ of mandate asking the Court to issue a peremptory writ of mandate commanding respondents Bruce McPherson, Secretary of State of the State of California, and Geoff Brandt, Acting State Printer in the Office of State Publishing of the State of California, to remove all materials pertaining to Initiative No. SA2004RF0037, Amdt. #1-NS and any materials pertaining to the initiative that have been designated by the Secretary of State as Proposition 77 from (1) the Voter Information Guide for the November 8, 2005, Special Statewide Election, and (2) the ballot for the November 8, 2005, Special Statewide Election.

The Attorney General seeks this writ relief because, prior to circulating the proposed measure to the voters, real parties in interest, Edward J. ("Ted") Costa, Dr. Arthur Laffer, Jimmie Johnson, and Major Gen. Sidney R. Novaresi (USAF, retired), the proponents of the proposed measure, failed to submit the text of the proposed initiative to the Attorney General for preparation of a title and summary as required by Article II, section 10, subdivision (d) of the California Constitution. Although Article II, section 10, subdivision (d) requires the proponents to provide the Attorney General with an exact "copy" of the initiative "[p]rior to [its] circulation" to registered voters, the proponents submitted a different version for circulation, thereby violating the Constitution and impairing the integrity of the process. This failure disqualifies Proposition 77 from the ballot.

Time is of the essence in this matter. Because of printing deadlines for the ballot pamphlet, the Attorney General will need to have this matter heard and decided, including any appeals, by Monday, August 15, 2005, at 5:00 p.m. Accordingly, the Attorney General respectfully requests that this matter be set for hearing on the peremptory writ of mandate on an expedited basis

Petitioner, by this verified Petition, alleges:

1. This Court has jurisdiction over this action pursuant to Code of Civil Procedure section 1085.

///

1 PARTIES

2 2. Petitioner, Bill Lockyer, is the Attorney General of the State of California. As
3 Attorney General, petitioner is the chief law officer of the State of California. (Cal.
4 Const., art. V, § 13.) It is the duty of the Attorney General to see that the laws are
5 uniformly and adequately enforced. (*Ibid.*) In addition, the Attorney General is required
6 by the Constitution to prepare a title and summary of the chief purpose and points of all
7 proposed initiative and referendum petitions before proposed measures are presented to
8 the electors for their consideration.

9 3. Respondent, Bruce McPherson, is the Secretary of State for the State of California
10 and is sued herein in his official capacity only. The Secretary of State is charged by statute with
11 the duties, *inter alia*, to issue instructions to county clerks and registrars of voters regarding the
12 verification of petition signatures; to receive from the county clerks and registrars of voters their
13 certificates as to the number of valid signatures submitted in support of the initiative (Elec. Code,
14 §§ 9030, 9031, 9033); and to take steps to place a qualified initiative on the statewide ballot
15 (Elec. Code, §§ 9081, 9082, 9086). As the chief elections officer, the Secretary of State has a
16 duty to ensure the integrity of the election process and to ensure that proposed measures have met
17 all constitutional and statutory requirements for presentment to and circulation among the voters
18 before matters are placed on the ballot.

19 4. Respondent, Geoff Brandt, is the Acting State Printer with the Office of State
20 Publishing, and is sued herein in his official capacity only. The State Printer is charged by statute
21 with the duty to print the ballot pamphlets as furnished by the Secretary of State (Elec. Code, §
22 9082), and in particular, printing the Voter Information Guide for the November 8, 2005, Special
23 Statewide Election.

24 5. Real Parties in Interest, Edward J. ("Ted") Costa, Dr. Arthur Laffer, Major
25 General Sidney S. Novaresi (USAF, retired), and Jimmie Johnson ("real parties") are the
26 proponents of a proposed initiative constitutional amendment, designated by the Secretary of
27 State as Proposition 77. Real parties are also the proponents of a proposed constitutional
28 amendment designated by the Attorney General as SA2004RF0037, Amdt. #1-NS.

1 **CERTIFICATION OF THE INITIATIVE BY THE SECRETARY OF STATE**

2 6. On June 10, 2005, the Secretary of State announced that he had certified
3 Proposition 77 for inclusion on the next statewide ballot. The Secretary of State announced that,
4 based on random sample verifications, Proposition 77 had received a projected 677,977
5 signatures, more than the 657,916 signatures needed to qualify. On June 13, 2005, Governor
6 Arnold Schwarzenegger issued a proclamation calling a statewide special election for November
7 8, 2005.

8 **NEED FOR IMMEDIATE JUDGMENT AND WRIT**

9 7. This matter must be decided as soon as possible in order to comply with the time
10 requirements in Elections Code section 9092 and Government Code section 88006 that this case
11 not interfere with the printing and distribution of the Voter Information Guide.

12 **THE PREPARATION OF TITLES AND SUMMARIES**

13 8. The California Constitution requires that “[p]rior to the circulation of an initiative
14 or referendum petition for signatures, a copy shall be submitted to the Attorney General who
15 shall prepare a title and summary of the measure as provided by law.” (Cal. Const., art. II, § 10,
16 subd. (d).)

17 9. The California Constitution further requires that the Legislature provide the
18 manner in which petitions for initiatives or referenda shall be “circulated, presented, and
19 certified, and measures submitted to the electors.” (Cal. Const., art. II, § 10, subd. (e).)

20 10. The Legislature has adopted statutes specifying that the Attorney General’s
21 constitutionally-mandated titles and summaries include summaries of the “chief purpose and
22 points” of each initiative or referendum that does not exceed 100 words. (Elec. Code, § 9002.)
23 The titles and summaries must be “true and impartial statement[s] of the purpose of the
24 measure[s],” rendered in non-argumentative language. (Elec. Code, § 9051.)

25 11. The Legislature has also enacted statutes governing the timing of the preparation
26 of titles and summaries by the Attorney General, requiring the Attorney General to seek
27 preparation of a fiscal analysis when necessary, and requiring the Attorney General to transmit
28 titles and summaries to the Legislature along with the proposed initiatives or referenda.

1 (Elec. Code, §§ 9004, 9005, 9007.)

2 12. The Attorney General is to provide a copy of his title and summary to the
3 Secretary of State within 15 days after either receiving the final version of a proposed initiative
4 measure, or 15 days after receiving the fiscal estimate or opinion prepared by the Department of
5 Finance and the Joint Legislative Budget Committee. (Elec. Code, § 9004.) During the initial
6 15-day period after the Attorney General has received the proposed measure, a proponent may
7 submit nontechnical, substantive changes to the proposed measure, in which case the statutory
8 deadline begins again.

9 **THE ATTORNEY GENERAL'S PREPARATION OF THE TITLE AND SUMMARY**

10 13. Since April 2004, the Attorney General's Office has received 11 proposed
11 initiatives relating to redistricting for preparation of titles and summaries. Of these proposed
12 initiatives, four proposals were submitted by Ted Costa on the letterhead of People's Advocate,
13 Inc. One of these initiatives was assigned docket number SA2004RF0037. This proposed
14 initiative was received by the Attorney General's Office on December 7, 2004. On that same
15 day, the Attorney General requested that the Department of Finance and the Legislative Analyst's
16 Office provide their analysis of the estimated fiscal impacts the measure would have on state and
17 local governments.

18 14. On January 28, 2005, Mr. Costa submitted a technical and nonsubstantive
19 amendment to the proposed measure which added Dr. Laffer, Mr. Johnson, and Major General
20 Novaresi as proponents. Accordingly, the Attorney General renumbered the Initiative as
21 "SA2004RF0037, Amdt. #1-NS" to reflect the change. No other changes to the proposed
22 measure were requested by proponents.

23 15. On February 3, 2005, the Attorney General issued his title and summary for
24 SA2004RF0037, Amdt. #1-NS to the Secretary of State. On that same day, the title and
25 summary for SA2004RF0037, Amdt. #1-NS and the text of the proposed measure were
26 transmitted to the Chief Clerk of the Assembly and the Secretary of the Senate pursuant to
27 Elections Code section 9007.

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1 16. Issuance of the Attorney General's title and summary on February 3, 2005,
2 allowed proponents of SA2004RF0037, Amdt. #1-NS to commence signature-gathering, using
3 the title and summary on their petitions. (Elec. Code, § 9008.) To qualify for the ballot, a
4 petition for a constitutional amendment must obtain the signatures of 8 percent of the voters for
5 all candidates for Governor at the last gubernatorial election prior to preparation of the title and
6 summary. (Elec. Code, § 9035.)

7 **ALTHOUGH THE PROPONENTS OF THE PROPOSED INITIATIVE SUBMITTED**
8 **ONE VERSION TO THE ATTORNEY GENERAL FOR PREPARATION OF THE**
9 **TITLE AND SUMMARY AND SUBMISSION TO THE LEGISLATURE, THEY**
10 **CIRCULATED A DIFFERENT VERSION TO THE VOTERS.**

11 17. By letter dated July 1, 2005, Undersecretary of State William P. Wood advised the
12 Senior Assistant Attorney General Louis Mauro "that the text printed on the petitions that were
13 circulated for this initiative [Proposition 77] differs from the text that was submitted to your
14 office for the preparation of the Attorney General's title and summary." The letter enclosed a
15 memorandum dated June 10, 2005, from Daniel M. Kolkey, whom Mr. Wood identified as
16 counsel for the Initiative's proponents. The Kolkey memorandum included an attached chart that
17 listed differences between the Initiative as submitted to the Attorney General and the text printed
18 on the circulating petitions. A true and correct copy of Mr. Wood's letter, including the Kolkey
19 memorandum and its chart, are attached hereto as Exhibit A.

20 18. Prior to July 5, 2005, the Attorney General's Office had not received a copy of the
21 proposed initiative submitted to the voters for signature gathering. On July 5, 2005, the Yuba
22 County Registrar's Office provided a staff member at the Attorney General's Office with a copy
23 of the text of the circulating petition. This circulating petition confirms that the proponents
24 circulated petitions containing text of a proposed measure that does not match the text of the
25 SA2004RF0037, Amdt. #1-NS, the proposed initiative upon which the Attorney General
26 prepared his title and summary.

27 19. A staff member of the Attorney General's Office has also checked the circulating
28 petition from Yuba County against the proposed redistricting initiatives submitted since the
November 2004 statewide general election. This examination confirmed that the version

1 circulated for signatures was never submitted to the Attorney General for preparation of a title
2 and summary.

3 20. Proposition 77 cannot qualify for the ballot because it was circulated in violation
4 of Article II, section 10, subdivision (d) of the California Constitution and Elections Code section
5 9002. SA2004RF0037, Amdt. #1-NS cannot appear on the ballot because proponents have not
6 gathered signatures on that version. (Elec. Code, § 9035.)

7 21. Respondent, Secretary of State, has a mandatory, ministerial duty to certify only
8 those proposed measures that conform to the law. Respondent, Secretary of State has no
9 discretion to certify proposed measures that do not conform to the law. A writ of mandate should
10 issue commanding respondent Secretary of State to decertify Proposition 77 and advise all county
11 registrars that Proposition 77 has been decertified and, further, commanding respondent, Acting
12 State Printer, to take no action to include any materials pertaining to either SA2004RF0037,
13 Amdt. #1-NS or Proposition 77 in the Voter Information Guide for the November 8, 2005,
14 Special Statewide Election or on the ballot for the November 8, 2005, Special Statewide
15 Election.

16 22. As chief law officer of the State, the Attorney General has a constitutional duty to
17 ensure the integrity of the initiative process. Here, where the Constitution was violated and the
18 integrity of the initiative process was impaired, the Attorney General has no plain, speedy and
19 adequate remedy in the ordinary course of law. (Code Civ. Proc., § 1086.) On July 7, 2005, the
20 Secretary of State sent a letter to the Attorney General acknowledging that this matter involved
21 “an apparently unprecedented situation,” but stating that he intends to put the Initiative on the
22 ballot “unless directed to do so otherwise by a court.” A true and correct copy of the Secretary of
23 State’s letter dated July 7, 2005, is attached hereto as Exhibit B.

24 WHEREFORE, Petitioner, Attorney General Bill Lockyer prays:

25 1. That this Court set this matter for hearing at the earliest time consistent with its
26 calendar;

27 2. That this Court issue a peremptory writ of mandate commanding respondents,
28 Bruce McPherson, Secretary of State of the State of California, to decertify Proposition 77 and,

1 further, commanding the Secretary of State and Geoff Brandt, Acting State Printer in the Office
2 of State Publishing of the State of California, to not allow any materials pertaining to Initiative
3 No. SA2004RF0037, Amdt. #1-NS or Proposition 77 to appear in (1) the Voter Information
4 Guide for the November 8, 2005, Special Statewide Election, or (2) on the ballot for the
5 November 8, 2005, Special Statewide Election.

6 3. For such other and further relief the Court deems just and proper.

7
8 Dated: July 8, 2005

Respectfully submitted,

9 BILL LOCKYER
Attorney General of the State of California

10 LOUIS R. MAURO
Senior Assistant Attorney General

11 CHRISTOPHER KRUEGER
Supervising Deputy Attorney General

12 LESLIE LOPEZ
Deputy Attorney General

13 VICKIE P. WHITNEY
Deputy Attorney General

14 DOUGLAS J. WOODS
Deputy Attorney General

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Attorneys for Petitioner
Bill Lockyer, Attorney General of the State of
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VERIFICATION

I, Tricia Knight, declare as follows:

I am Initiative Coordinator for the Office of the Attorney General of the State of California. I have read the foregoing Petition for Writ of Mandate and know its contents. The facts stated therein are true and are within my personal knowledge, except as to those matters which are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 8, 2005, at Sacramento, California.

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EXHIBIT - A



BRUCE McPHERSON | SECRETARY OF STATE | STATE OF CALIFORNIA
EXECUTIVE OFFICE | 1500 11th Street, Sacramento, CA, 95814 tel 916.653.7244 fax 916.653.4620 www.ss.ca.gov

BY HAND DELIVERY

July 1, 2005

Louis Mauro
Senior Assistant Attorney General
Department of Justice
1300 I Street
Sacramento, CA 95814

Dear Mr. Mauro:

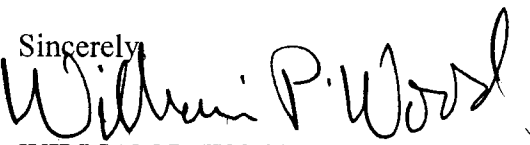
A situation has come to the attention of the Secretary of State's office concerning an initiative that has qualified for the November 8, 2005, Special Statewide Election ballot.

The initiative in question has been given the title "Reapportionment. Initiative Constitutional Amendment." by your office. We have been informed by the proponent that the text printed on the petitions that were circulated for this initiative differs from the text that was submitted to your office for the preparation of the Attorney General's title and summary.

It has been suggested by an attorney representing the initiative's proponents that the Secretary of State has a ministerial duty to submit to the voters the text that appeared on the petition that was circulated to and signed by the voters. Therefore, we are seeking guidance from your office whether the Secretary of State has the authority to make a determination which version of the text of a measure should be placed before the voters. A copy of a memorandum and a list of the differences between the two versions of the text prepared by the attorney representing the initiative's proponents are enclosed with this letter for your review.

As you know, time is of the essence in this matter. The ballot pamphlet containing the text of the measure is scheduled to go on public display July 26, 2005. Therefore, we would appreciate receiving your opinion on this issue as quickly as possible.

Thank you for your assistance. Please feel free to contact me if you would like to discuss this matter further.

Sincerely,

WILLIAM P. WOOD
Undersecretary of State

Enclosure

GIBSON, DUNN & CRUTCHER LLP

June 10, 2005

T 30927-00001

MEMORANDUM

FROM: Daniel M. Kolkey
RE: Voter Empowerment Act

INTRODUCTION

Where the Secretary of State is presented an initiative petition that (i) is in the proper format, (ii) has an impartial and accurate title and summary prepared by the Attorney General, and (iii) is certified as having been signed by the requisite number of voters, the Secretary has a ministerial duty to submit the text of that petition to the voters. (Cal. Const., art. II, § 8, subd. (c).)

No elections code provision suggests that technical, non-substantive differences between the text of the certified petition and the draft submitted to the Attorney General for title and summary alters that duty as long as the title and summary is not misleading. And in this case, not one of the technical differences between the draft submitted to the Attorney General and the text of the circulating initiative petition implicates any of the points made in the title and summary.

Finally, the case law squarely upholds the validity of a certified initiative petition, notwithstanding technical differences between it and the draft submitted to the Attorney General.

I.

UNDER THE CALIFORNIA CONSTITUTION, THE SECRETARY OF STATE HAS A MINISTERIAL DUTY TO SUBMIT TO VOTERS AT THE NEXT SPECIFIED GENERAL OR SPECIAL STATEWIDE ELECTION ANY PROPOSED INITIATIVE MEASURE THAT IS IN PROPER FORM AND HAS BEEN CERTIFIED AS SIGNED BY THE REQUISITE NUMBER OF VOTERS

The California Constitution makes clear that an initiative measure that is certified to have been signed by the requisite number of electors *must* be submitted to the voters at the next general election held at least 131 days after it qualifies or any special statewide election held prior thereto.

Specifically, article II, section 8 of the California Constitution provides in relevant part:

"(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent

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in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

(c) The Secretary of State *shall then submit the measure* at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may call a special statewide election for the measure." (Italics added.)

(Cal Const. Art. II, §8, subd. (b) and (c).)

Accordingly, once an initiative petition, which sets forth the text of a proposed constitutional amendment and which has been certified to have been signed by the requisite number of electors, has been presented to the Secretary of State, it is that measure that the Secretary of State "shall" submit at the next general or special statewide election.

The use of the word "shall" demonstrates that the Secretary of State's constitutional duty is mandatory and leaves the Secretary no discretion in the performance of his duty. (See Cal. Const., art. I, § 26; *Hart v. Jordan* (1939) 14 Cal.2d 288, 292.) Specifically, the California Constitution expressly provides: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Cal. Const., art. I, § 26.) And the California courts have construed "shall" in the context of the Constitution to be mandatory. (E.g., *Smith v. State Bd. of Control* (1932) 215 Cal. 421, 428 [noting that the use of the term "shall" in section 7 of article IX of the California Constitution is a mandatory prescription]; see 26 Ops. Cal. Atty. Gen. 25 (1955) [use of the term "shall" imposes a mandatory duty on the Governor to issue a writ of election whenever a vacancy occurs in either the State Assembly or Senate].)

In *Hart v. Jordan, supra*, 14 Cal.2d 288, the California Supreme Court ruled that a referendum which qualified for submission to the voters had to be presented at a special election that had already been called, notwithstanding the existence of statutory provisions that fixed longer times for preparing the referendum measure for the ballot than the constitutional period of thirty days. The Court ruled: "It does not appear that the statutory requirements cannot be either fully or substantially complied with by the respondents in preparing material for the coming election, but wherever they conflict with constitutional provisions, the latter must prevail." (*Id.* at p. 292.)

Accordingly, here, the constitutional mandate that a certified petition be submitted to the voters would override a contrary statutory provision, if any.

Of course, under article II, section 10, subdivision (e) of the California Constitution, "[t]he Legislature shall provide the manner in which petitions shall be circulated, presented, and certified, and measures submitted to the electors." Thus, the Constitution delegates to the Legislature the task of setting forth the manner by which initiative measures shall be circulated, presented, certified, and submitted to the electors (except to the extent that it conflicts with a constitutional mandate). Therefore, the petition presented to the Secretary, as contemplated by the Constitution, must comply with formatting requirements specified by the code, and an elections official presumably has a ministerial duty to ascertain whether the procedural

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requirements for submitting an initiative measure have been met. (See *Myers v. Patterson* (1987) 196 Cal.App.3d 130.)

Nonetheless, nothing in the Elections Code suggests that the Secretary of State has any discretion but to submit a certified petition to the electorate for a vote if it meets the code's format requirements and did not mislead the voters.

II.

UNDER THE ELECTIONS CODE, AN INITIATIVE PETITION WHICH IS IN PROPER FORM WITH AN ACCURATE TITLE AND SUMMARY AND WHICH HAS BEEN CERTIFIED AS SIGNED BY THE REQUISITE NUMBER OF ELECTORS MUST BE SUBMITTED TO THE VOTERS.

A. The Format for the Initiative Petition

The elections code provides the proper format for initiative petitions. The initiative petition here satisfies that criteria.

Elections Code Section 9001 provides that the heading of a proposed initiative measure "shall be in substantially the following form":

"Initiative Measure to Be Submitted Directly to the Voters

The Attorney General of California has prepared the following title and summary of the chief purpose and points of the proposed measure:
(Here set forth the title and summary prepared by the Attorney General.
This title and summary must also be printed across the top of each page of the petition whereon signatures are to appear.)

To the Honorable Secretary of State of California

We, the undersigned, registered, qualified voters of California, residents of _____ County (or City and County), hereby propose amendments to the Constitution of California (the _____ Code, relating to _____) and petition the Secretary of State to submit the same to the voters of California for adoption or rejection at the next succeeding general election or at any special statewide election held prior to that general election or otherwise provided by law. The proposed constitutional (or statutory) amendments (full title and text of the measure) read as follows:" (Elections Code, § 9001.)

The initiative petitions here are in substantially the above-referenced form, which is all that Elections Code section 9001 requires since it states that the proposed initiative measure "shall be in substantially the following form."

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B. *Title and Summary*

Under Elections Code section 9002, prior to the circulation of any initiative petition for signatures, "a draft" of the proposed measure shall be submitted to the Attorney General for purposes of a title and summary:

"Prior to the circulation of any initiative or referendum petition for signatures, a draft of the proposed measure shall be submitted to the Attorney General with a written request that a title and summary of the chief purpose and points of the proposed measure be prepared. The title and summary shall not exceed a total of 100 words." (Elec. Code, § 9002.)

This ballot summary "cannot be misleading." (*Brennan v. Board of Supervisors* (1981) 125 Cal. App. 3d 87, 93.) Instead, the ballot summary must be "true and impartial, and not argumentative . . . likely to create prejudice for or against the measure (*Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal. 3d 208, 243) and must reasonably inform the voter of the character and real purpose of the proposed measure. (*Brennan v. Board of Supervisors, supra*, 125 Cal. App. 3d at p. 93.)

Again, in this case, the ballot title and summary is not misleading, is true and impartial, is not argumentative, and reasonably informs the voter of the character and real purpose of the proposed measure: to amend the process of redistricting by "[r]equir[ing] a three-member panel of retired judges, selected by legislative leaders, to adopt new redistricting plan if measure passes and again after each national census," but allowing voters to subsequently reject any such plan. (Attorney General's Title and Summary for the Voter Empowerment Act.)

Moreover, not one of the technical differences between the draft submitted to the Attorney General and the text of the circulating initiative petition implicates any of the points made in the title and summary.

C. *Each Section of the Initiative Petition Was the Same*

Elections Code Section 9014 provides that initiative petitions may be presented in sections, but that each section must contain a full and correct copy of the title and text of the proposed measure, which again was satisfied here:

"Any initiative or referendum petition may be presented in sections, but each section shall contain a full and correct copy of the title and text of the proposed measure. The text of the measure shall be printed in type not smaller than eight point."

Here, each section of the initiative petition did contain a full and correct copy of the title and text. Only the uncirculated draft submitted to the Attorney General differs.

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D. *Certification of the Initiative Petition*

Under Elections Code Section 9030, the elections officials of the county or city and county in which the petition was circulated determine whether the petition has the requisite number of signatures of qualified voters needed to qualify for the ballot. Upon completion of the examination, the elections officials "shall immediately *attach to the petition*" a properly dated certificate showing the results of the examination and "shall immediately transmit the *petition and the certificate* to the Secretary of State." (Elections Code § 9030, subd. (e), italics added.)¹

It is this petition, – the one attached to the certificate – with which the Secretary of State is presented. It is therefore the measure on that petition that the Secretary is required by the Constitution to submit at the next specified general or special statewide election. (Cal. Const., art. II, subd. (c).)

Under Elections Code section 9034, "[u]pon the certification of an initiative measure for the ballot, the Secretary of State shall transmit copies of the initiative measure, together with the ballot title as prepared by the Attorney General pursuant to Section 9050, to the Senate and Assembly. . . ."

Again, the initiative measure submitted to the Senate and Assembly is that which was certified as having sufficient signatures under Elections Code section 9030.

Under Elections Code section 9030, subdivision (g), where the certificates received from all elections officials by the Secretary of State total more than 110 percent of the number of qualified voters needed to find the petition sufficient, "the petition shall be deemed to qualify as of the date of receipt by the Secretary of State of certificates showing the petition to have reached the 110 percent, and the Secretary of State shall immediately so notify the proponents and the elections officials."

Reading Elections Code section 9030 in its entirety, it is clear that the petition that is deemed sufficient to qualify for the ballot is that which is attached to the certificate verifying the signatures. (Elec. Code, § 9030, subd. (a).)

Finally, Elections Code section 9035 provides that an initiative measure is proposed by presenting to the Secretary of State a petition that "sets forth the text of the proposed . . . amendment to the Constitution" and is certified to have been signed by the requisite number of voters:

¹ Elections Code section 9030, subdivision (e) provides in full: "The elections official, upon the completion of the examination, shall immediately attach to the petition, except the signatures thereto appended, a properly dated certificate, showing the result of the examination, and shall immediately transmit the petition and the certificate to the Secretary of State. A copy of this certificate shall be filed in the elections official's office."

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"An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by registered voters equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the voters for all candidates for Governor at the last gubernatorial election preceding the issuance of the title and summary for the initiative measure by the Attorney General."

This code section parallels the constitutional provision, and makes clear that the proposed initiative measure is the one contained in the petition "present[ed] to the Secretary of State," which is certified to have been signed by the requisite number of registered voters.

Accordingly, the Elections Code makes clear that the initiative measure presented by petition to the Secretary of State, certified as having been signed by the requisite number of voters, is that which the Constitution mandates be placed on the ballot. Further, nothing in the Elections Code alters the Secretary's ministerial duty under the Constitution to submit the text of the constitutional amendment to voters if the petition containing it has been certified as signed by the requisite number of voters and is in the proper form.

III.

NO CODE SECTION EXPRESSLY REQUIRES THE DRAFT MEASURE SUBMITTED TO THE ATTORNEY GENERAL TO BE EXACTLY THE SAME AS THE CIRCULATING INITIATIVE PETITION.

Nothing in the Elections Code expressly requires that the draft of the proposed measure submitted to the Attorney General for title and summary be exactly the same as the text of the circulating initiative petition as long as the differences are technical and non-substantive.

Nor does the Elections Code suggest that the text of that which was submitted to the Attorney General be substituted on the ballot for the text of the qualifying and circulating petition.

Elections Code Section 9002 provides that only a "draft" of the proposed measure is submitted to the Attorney General for title and summary:

"Prior to the circulation of any initiative or referendum petition for signatures, a draft of the proposed measure shall be submitted to the Attorney General with a written request that a title and summary of the chief purpose and points of the proposed measure be prepared. The title and summary shall not exceed a total of 100 words.

The persons presenting the request shall be known as the 'proponents.'

The Attorney General shall preserve the written request until after the next general election." (Elections Code, § 9002).

Further, Elections Code section 9004 acknowledges that technical non-substantive amendments can be made to the submission to the Attorney General, which need not implicate the preparation of the title and summary. Section 9004 provides in relevant part as follows:

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"Upon receipt of a draft of a petition, the Attorney General shall prepare a summary of the chief purposes and points of the proposed measure. . . . The Attorney General shall provide a copy of the title and summary to the Secretary of State within 15 days after receipt of a proposed initiative measure [¶] If during the 15-day period, the proponents of the proposed initiative measure submit amendments, other than technical, non-substantive amendments, to the final version of the measure, the Attorney General shall provide a copy of the title and summary to the Secretary of State within 15 days after receipt of the amendments. . . ."

Thus, the code contemplates the prospect of technical, non-substantive amendments to the draft of the petition.

Elections Code section 9007 provides that the Attorney General shall transmit copies of the submitted text of the measure and summary to the Senate and Assembly upon preparation of the summary, but immaterial changes to the measure should not affect any such public hearings on the subject, and in any event the Legislature has no authority to alter the measure or prevent it from appearing on the ballot:

"Immediately upon the preparation of the summary of an initiative or referendum petition, the Attorney General shall forthwith transmit copies of the text of the measure and summary to the Senate and Assembly. The appropriate committees of each house may hold public hearings on the subject of the measure. However, nothing in this section shall be construed as authority for the Legislature to alter the measure or prevent it from appearing on the ballot." (Elections Code, §9007.)

Finally, Elections Code section 9030, subdivision (a), prohibits petitions from being amended, except by order of a court, *once they are filed with the elections officials*. But no such amendment, following filing, has taken place here.

"Each section of the petition shall be filed with the elections official of the county or city and county in which it was circulated, but all sections circulated in any county or city and county shall be filed at the same time. Once filed, no petition section shall be amended except by order of a court of competent jurisdiction." (Elec. Code, § 9030, subd. (a).)

While the code may assume that the text submitted to the Attorney General (albeit subject to amendments) is the same as that on the circulating initiative petition, the code sections, together, do not *expressly require* that the text submitted to the Attorney General be identical to that which is circulated. Instead, the code sections refer to the proposed measure submitted to the Attorney General as a "draft" (Elec. Code, §9002), allow technical, non-substantive amendments to the version submitted to the Attorney General (*id.*, § 9004), and only expressly prohibit amendments to the petition *after* it has been filed with elections officials (*id.*, §9030, subd. (a)). No code provision provides otherwise or could supersede the constitutional mandate.

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An immaterial difference, whether clerical or typographical, between the draft submitted to the Attorney General and the text of the circulating petition would not alter the Secretary of State's ministerial duty under the Constitution to submit to voters the text of a certified petition that is in proper form and did not mislead the voters. No code provision provides otherwise or could supersede the constitutional mandate.

IV. COURT DECISIONS DEMONSTRATE THAT A QUALIFIED INITIATIVE PETITION WITH AN ACCURATE TITLE AND SUMMARY IS VALID

A. *Technical Defects That Do Not Frustrate The Code's Purpose Do Not Invalidate An Initiative Petition*

"[T]he courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]. '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserved power, courts will preserve it.' [Citations.]" (*Associated Homebuilders Etc., Inc. v. City of Livermore* (1976) 18 Cal. 3d 582, 591.)

""[A] paramount concern in determining whether a petition is valid despite an alleged defect is whether the purpose of the technical requirement is frustrated by the defective form of the petition."" (*Assembly v. Deukmejian* (1982) 30 Cal. 3d 638, 652.)

In this case, even assuming that the draft of the initiative measure submitted to the Attorney General should be exactly the same as the text of the circulating petition, the purpose for the requirement that a draft of the measure be submitted to the Attorney General for title and summary (Elec. Code § 9002) is satisfied where the title and summary of the proposed measure is impartial and not misleading. (*Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208, 243.) After all, "[t]he main purpose of these [election code] requirements is to avoid misleading the public with inaccurate information." (*Id.*; *Clark v. Jordan* (1936) 7 Cal.2d 248, 251.) And here, the immaterial differences between the draft submitted to the Attorney General and the text of the circulating petition do not even implicate the points included in the title and summary. Thus, even assuming that the draft of the initiative measure submitted to the Attorney General should be the same as the text of the circulating petition, the initiative petition remains valid because it had an accurate title and summary and thus substantially complies with the law.

The California Supreme Court "has stressed that technical deficiencies in referendum and initiative petitions will not invalidate the petitions if they are in 'substantial compliance' with statutory and constitutional requirements. [Citation.] . . . 'The requirements of both the Constitution and the statute are intended to and do give information to the electors who are asked to sign the . . . petitions. If that be accomplished in any given case, little more can be asked than that a substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirements of the law.' [Citation.]" (*Assembly v. Deukmejian, supra*, 30 Cal.3d at pp. 652-653; accord, *Fox Bakersfield*

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Theatre Corp. v. City of Bakersfield (1950) 36 Cal.2d 136, 145; *Epperson v. Jordan* (1938) 12 Cal.2d 61, 70.)

That is the case here.

B. *A Recent Court Decision Has Squarely Upheld An Initiative Measure That Used the Summary and Title of An Earlier Version*

In *MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, the Court of Appeal upheld an initiative petition that used the title and summary prepared for an earlier version. There, the city attorney prepared a ballot title and summary for a proposed initiative petition (the March 18 initiative), but a subsequent modified version submitted to the city clerk (the April 2 initiative) was circulated under the ballot title and summary prepared for the *earlier* version. After the petition qualified, the city council chose to adopt the proposed initiative as an ordinance, rather than submit it to the voters, as authorized by Elections Code section 9215. But owing to an administrative mistake, the text of the earlier March 18 initiative was adopted by the Council, only to be replaced with the circulated April 2 version over three years later after the error came to light.

The Court of Appeal found that enactment of the uncirculated March 18 version could be cured with enactment of the circulated version and that the use of the title and summary meant for the uncirculated version constituted substantial compliance. Among other things, the Court of Appeal expressly rejected the claim that the enactment of the ordinance that was circulated in the initiative petition (the April 2 initiative) was invalid on the ground that the ballot title and summary was prepared for the earlier March 18 version:

"The City contends the court erred in ruling Ordinance 412 [the April 2 initiative] was invalid on the ground that a ballot title and summary was not prepared for the April 2 initiative. When, as here, there is no dispute about the format of an initiative petition presented to the city clerk, and the issue on appeal is whether the petition substantially complies with the ballot title and summary requirements of section 9203, subdivision (b), [fn. omitted] we review the matter de novo. [Citation.]

[¶] . . . [¶] Based on our comparison of the ballot title and summary circulated with the April 2 initiative petition with the sections of the April 2 initiative addressed by the summary, we are satisfied that the title and summary accurately reflect the substance of the April 2 initiative and therefore did not frustrate the purposes of the title and summary requirement of Section 9203. The differences between the full text of Ordinance 381 (the March 18 initiative) and full text of the April 2 initiative adopted as Ordinance 412 are sufficiently material to contravene Section 9215, which requires that a qualified initiative be adopted 'without alteration.' However, they do not go to the heart of the circulated initiative, and thus do not render the ballot title and summary prepared for the uncirculated March 18 initiative misleading as to the circulated April 2 initiative. [Fn. omitted.]"

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MHC Financing Limited Partnership Two v. City of Santee, supra, 125 Cal.App.4th at pp. 1388-1390.)

This is a much stronger case than *MHC Financing* since here the version enacted will not be the uncirculated version (which in *MHC Financing* the court found to violate Elections Code section 9215), and here the differences between the draft and the circulated version do not implicate the title and summary (whereas in *MHC Financing*, three differences between the two versions were reflected on the summary).

If the ultimate enactment of the circulated initiative in *MHC Financing* was not invalid – despite the use of a title and summary from an earlier version which implicated some points in the title and summary – the circulated version here is properly submitted for enactment, despite use of a title and summary prepared for an earlier version which does *not* implicate any of the technical differences in the circulated version.

C. *Court Decisions Have Even Upheld Ballot Measures That Differ From the Text of the Circulating Initiative Petition*

The courts have even refused to invalidate ballot measures on the grounds of technical differences between the initiative petition circulated for signature and the final corrected version included as part of the state ballot pamphlet. (*See Guillory v. Superior Court* (2002) 100 Cal. App. 4th 750, 772-775; *People v. Scott* (2002) 98 Cal. App. 4th 514.)

In that circumstance, the courts have held "'invalidation of a ballot measure is only required if 'the materials, in light of other circumstances of the election, were so inaccurate or misleading as to prevent the voters from making informed choices. . . .'" (*Guillory v. Superior court, supra*, 100 Cal. App. 4th at p. 772; *People v. Scott, supra*, 98 Cal.App.4th 514; compare *San Francisco Forty-Niners v. Nishioka* (1999) 75 Cal.App.4th 637 [addressing objectively inaccurate information and calculated untruths that substantially misled and misinformed a reasonable voter].)

Since technical and non-substantive differences between the text of the initiative petition circulated for signature and the text of the version in the State ballot pamphlet are insufficient to invalidate the measure, there is certainly no basis to invalidate an initiative measure whose text on the ballot is the *same* as the text of the measure circulated for signature, where neither the title and summary nor other circumstances have misled any voters from making an informed choice. (*See MHC Financing Ltd., supra*, 125 Cal.App.4th at p. 1384 [voters who signed the circulated measure were entitled to have their decision implemented].)

In this case, the title and summary of the initiative petition is not misleading, and the differences between the draft submitted to the Attorney General and the text of the circulated petition are non-substantive and technical. Therefore, no purpose of any technical election code requirement is frustrated, and the people's right to the initiative process should not be annulled. (*Associated Homebuilders Etc., Inc. v. City of Livermore, supra*, 18 Cal.3d at p. 591.)

DMK/cjd

REDISTRICTING REFORM: VOTER EMPOWERMENT ACT
TEXTUAL COMPARISON

| | | |
|---------------------------|--|---|
| Art. XXI, § 1(b) | "... until the next adjustment of boundary lines is required pursuant to subdivisions (a) or (i)." | "... until the next adjustment of boundary lines is required pursuant to this article. " |
| Art. XXI, § 1(c)(2)(A) | "... the Judicial Council shall nominate by lot..." | "... the Judicial Council shall select by lot..." |
| Art. XXI, § 1(c)(2)(A) | "... shall be equally represented among the nominated retired judges..." | "... shall be equally represented among the selected retired judges..." |
| Art. XXI, § 1(c)(2)(B) | "A retired judge selected ..." | "A retired judge appointed ..." |
| Art. XXI, § 1(c)(2)(C) | "From the pool of retired judges nominated ..." | "From the pool of retired judges selected ..." |
| Art. XXI, § 1(c)(2)(C) | "... shall each nominate, no later than five days before the deadline..." | "... shall each nominate, no later than six days before the deadline..." |
| Art. XXI, § 1(c)(2)(E) | "No later than three days before the deadline..." | "No later than four days before the deadline" |
| Art. XXI, § 1(c)(2)(F) | "... If the drawing is unable to produce at least one Special Master from each of the two largest political parties, the drawing for the Special Master from the political party not represented from the list of remaining nominees shall be made from the original pool of twenty-four retired judges nominated by the Judicial Council..." | "... If said list of remaining nominees does not include a retired judge from each of the two largest political parties, the drawing for the Special Master from the absent political party or parties shall be made from the original pool of twenty-four retired judges selected by the Judicial Council..." |
| Art. XXI, § 1(g) | "... for use at the next statewide primary and general election, and if adopted by initiative pursuant to subdivision (h), for succeeding elections..." | "... for use at the next statewide primary and general elections , and if adopted by initiative pursuant to subdivision (h), shall remain effective for succeeding elections..." |
| Art. XXI, § 1(h) | "... at the same next general election provided for under subdivision (g)..." | "... at the same next general election as specified under subdivision (g)..." |

*Differences in text bolded for the convenience of the reader.

REDISTRICTING REFORM: VOTER EMPOWERMENT ACT
TEXTUAL COMPARISON

| | | |
|---------------------|--|---|
| Art. XXI, § 1(k) | "Except for judicial decrees, the provisions of this article are the exclusive means of adjusting the boundary lines of the districts specified herein." | "Except for judicial decrees, the provisions of this article are the exclusive means of adjusting the boundary lines of the districts specified herein, and the powers under Sections 8 and 9 of Article II shall be used only in the manner specified in subdivisions (g) and (h) herein." |
|---------------------|--|---|

*Differences in text bolded for the convenience of the reader.

REDISTRICTING REFORM: VOTER EMPOWERMENT ACT

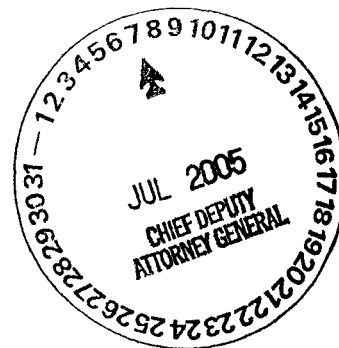
TEXTUAL COMPARISON

| Section 1 of Initiative Petition | Initiative Petition | Redistricting Reform: The Voter Empowerment Act |
|---|--|--|
| <p>Section 1 of Initiative Petition</p> <p>[Note: The findings and declarations of purpose of the text found in the circulating petitions was substantially edited from the version filed with the Attorney General's office, including stylistic word changes and the addition of new subsection (d), and the renumbering of the old subsection (d) to subsection (c). Due to these more substantial stylistic revisions, the text of both versions is set out in this row without bold text.]</p> | <p>The People of the State of California find and declare that:</p> <p>(a) Our Legislature should be responsive to the demands of the citizens of the State of California, and not the self-interests of individuals legislators or the partisan interests of political parties.</p> <p>(b) Self-interest and partisan gerrymandering have resulted in uncompetitive districts, ideological polarizations in our institutions of representative democracy, and a disconnect between the interests of the People of California and their elected representatives.</p> <p>(c) The redistricting plans adopted by the California Legislature in 2001 serve incumbents, not the People, are repugnant to the People, and are in direct opposition to the People's interest in fair and competitive elections. They should not be used again.</p> <p>(d) We demand that our representative system of government be fair to all, open to public scrutiny, free of conflicts of interest, and dedicated to the principle that government derives its power from the consent of the governed. Therefore, the People of the State of California hereby adopt the "Redistricting Reform: The Voter Empowerment Act."</p> | <p>The People of the State of California find and declare that:</p> <p>(a) Our Legislature should be responsive to the demands of the voters, but existing law places the power to draw the very districts, in which legislators are elected in the hands of incumbent state legislators, who then choose their voters, which is a conflict of interest.</p> <p>(b) The Legislature's self-interest in drawing its members' districts has resulted in partisan gerrymandering, uncompetitive districts, ideological polarization, and a growing division between the interests of the People of California and their elected representatives.</p> <p>(c) The redistricting plans adopted by the California Legislature in 2001 produced an unprecedented number of uncompetitive districts, serve incumbents and not the People, and are repugnant to the People. The gerrymandered districts of 2001 resulted in not a single change in the partisan composition of the California Legislature or the California congressional delegation in the 2004 elections. These districts should be replaced as soon as possible and never used again.</p> <p>(d) The experience of the 1970s and 1990s demonstrates that impartial special masters, who are retired judges independent of partisan politics and the Legislature, can draw fair and competitive districts by virtue of their judicial training and judicial temperament.</p> <p>(e) We demand that our representative system of government assure that the voters choose their representatives, rather than their representatives choose their voters, that it be open to public scrutiny and free of conflicts of interest, and that the system embody the principle that government derives its power from the consent of the governed. Therefore, the People of the State of California hereby adopt the "Redistricting Reform: The Voter Empowerment Act."</p> |

*Differences in text bolded for the convenience of the reader.

EXHIBIT - B

SECRETARY OF STATE
BRUCE McPHERSON
STATE OF CALIFORNIA



VIA FACSIMILE

July 7, 2005

The Honorable Bill Lockyer
Attorney General
State of California
1300 I Street
Sacramento, CA 95814

Dear Attorney General Lockyer:

The California Constitution declares, "All political power is inherent in the people." And further, "Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require it." The initiative is "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." So states the Constitution of California, Article II, sections 1 and 8, respectively.

As Secretary of State, I have the constitutional duty to present to the voters of California the measures that have qualified to appear on the ballot by the signatures of the people. I intend to do so unless directed to do otherwise by a court.

I firmly believe, as Secretary of State, that qualified measures must be put on public display and presented to the voters of California on the November 8th Special Election ballot. My responsibility in that regard is clearly stated in the California Constitution, Article II, section 8(c). As the Chief Elections Officer of the State of California it is my obligation to ensure that qualified measures are submitted to the people so that every eligible voter in the state has the choice to cast a ballot on those qualified initiatives.

As you know, an apparently unprecedented situation came to the attention of my office concerning an initiative that was qualified for the November 8, 2005 Special Statewide Election ballot with 951,776 signatures. The initiative in question has been given the title "Reapportionment. Initiative Constitutional Amendment" by your office. We were informed by the proponent that the text printed on the circulated petitions for this initiative differs from the text that was submitted to your office for the preparation of the Attorney General's title and summary.

AG-0775

The proponent's attorney suggested that the Secretary of State has the ministerial duty to submit to the voters the text that appeared on the petitions circulated to and signed by the voters. By letter on July 1, 2005 we requested your guidance whether the Secretary of State has the authority to make a determination which version of the text of a measure should be placed before the voters. Your staff met with my staff yesterday to discuss this matter concerning the reapportionment measure that has qualified for the November 8, 2005, Special Statewide Election ballot.

At that meeting your staff responded to two issues. First, your office has determined that you cannot represent the Secretary of State's office in this matter, and therefore, as of yesterday, we have no attorney-client relationship with respect to this issue.

Secondly, because you will not be representing us in this matter, you are not going to respond to our request for advice as set forth in my July 1, 2005 letter. Furthermore, your staff indicated that you might seek a judicial resolution of issues related to your responsibilities in the preparation of initiative materials.

While I respect your views in this matter, as my staff indicated yesterday I believe that any judicial resolution sought by your office should occur immediately. It is in the best interests of the people for a speedy, certain, and final judicial resolution of the questions in this matter. Time is of the essence. The ballot pamphlet containing the text of the measure will go on public display July 26, 2005.

In conclusion, as I stated earlier, my constitutional duty as Secretary of State is to present to the voters of California measures that have qualified to appear on the ballot.

Respectfully,



BRUCE McPHERSON
Secretary of State